

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUG ALLEN-LEROY FORTINE,

Defendant-Appellant.

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UNPUBLISHED

February 6, 2007

No. 261898

Muskegon Circuit Court

LC No. 03-049032-FC

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced to concurrent terms of 15 to 30 years’ imprisonment. He appeals by right. We affirm.

Defendant’s convictions arise out of the sexual assault of his niece, the complainant, who was 11 years old at the time of defendant’s second trial.<sup>1</sup> She testified that defendant touched her vagina with his finger and with “his lower private part” on multiple occasions while in her house and once while inside a tent. The complainant recalled one incident that occurred in her bedroom while defendant was babysitting her in which defendant penetrated her vagina with his penis. She recalled another incident when she was inside a tent during her family’s annual summer pig roast. On that occasion, defendant penetrated her vagina with his finger. A medical examination conducted at least five months after the incident in the tent revealed no clear evidence of penetration,<sup>2</sup> and defendant denied ever having touched his niece in an inappropriate manner.

Defendant first argues that he is entitled to a new trial because the trial court conducted the voir dire of the jury itself and limited the parties’ questioning of the prospective jurors. We disagree. It is within a trial court’s discretion to conduct voir dire itself, and, thus, this Court

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<sup>1</sup> Defendant’s first trial resulted in a hung jury.

<sup>2</sup> The prosecution’s expert witness testified that this finding did not necessarily confirm that no sexual penetration occurred.

reviews challenges concerning voir dire for an abuse of discretion. MCR 6.412(C)(1); *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994).

“The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially.” *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). Voir dire is conducted to discover grounds for challenging prospective jurors for cause and to gain knowledge “to facilitate an intelligent exercise of peremptory challenges.” MCR 6.412(C)(1). A defendant does not have a right to have defense counsel conduct voir dire or a right to have the trial court ask prospective jurors questions submitted by counsel. *Tyburski, supra* at 619. Rather, MCR 6.412(C)(2) provides the trial court discretion regarding the conduct of voir dire and provides, in pertinent part:

The court may conduct the examination of prospective jurors or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask.

“[W]here the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised.” *Tyburski, supra* at 619.

Defendant contends that the trial court’s limitations regarding the scope and duration of the questioning of prospective jurors inhibited him from developing a sufficient basis on which to exercise challenges. Defendant fails to indicate what matter or matters he was prevented from inquiring of the prospective jurors. Rather, he merely argues that if the trial court had not limited his time for questioning the prospective jurors, the result would have been different, as it was in his first trial. Merely because the result of defendant’s first trial was different, however, does not mean that the voir dire procedure utilized below prevented defendant from intelligently exercising his peremptory challenges and challenges for cause. During voir dire, the trial court questioned the prospective jurors regarding their possible biases and also discussed with them issues submitted by the parties. During a break in the proceeding, the trial court instructed both parties to review their lists of proposed voir dire questions and to inform the court if there were other matters that the parties wanted the court to discuss with the prospective jurors. After further voir dire, the trial court allowed each party to question the prospective jurors directly for ten minutes. Thereafter, the parties exercised their challenges for cause as well as peremptory challenges and were permitted to question replacement jurors directly. The record does not support defendant’s contention that the trial court’s limitations inhibited him from being able to develop a sufficient basis on which to exercise challenges.

Defendant also argues that the prosecution’s late filing of its proposed voir dire questions prevented him from properly objecting to the questions. But defendant does not identify which question or questions submitted by the prosecution were objectionable. He further contends that the trial court failed to adequately address his proposed voir dire questions before questioning prospective jurors and relies on a portion of the transcript in which defense counsel attempted to inform the prospective jurors of the previous hung jury. The prosecutor objected, and the trial court sustained the objection, instructing the jury to disregard any statements concerning the fact

that defendant was being tried for the second time. Defendant has not shown how the trial court's failure to address this issue before juror questioning adversely affected him.

Defendant next argues that the trial court abused its discretion by admitting under MRE 404(b) evidence of uncharged conduct involving both the complainant and her brother. We disagree. This Court reviews for clear abuse of discretion the admission of other-acts evidence at trial. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). An abuse of discretion exists if an unprejudiced person, considering the facts on which the trial court relied, would conclude that there was no excuse for the ruling made. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Generally, a decision on a close evidentiary question cannot be an abuse of discretion. *Id.*

MRE 404(b)(1) governs the admission of prior bad acts evidence. Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. Second, the evidence must be relevant under MRE 402. Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

At trial, the complainant recalled several instances of sexual conduct perpetrated by defendant. In addition, the complainant's brother testified that he witnessed one of the incidents between the complainant and defendant, and that defendant engaged in sexual contact with him on the same day. Defendant concedes that the trial court "ostensibly found a proper purpose" for admitting the other acts evidence involving the complainant and her brother, but argues that it was inadmissible because unfair prejudice substantially outweighed its probative value. In particular, defendant contends that the evidence was used merely to bolster the credibility of the complainant and her brother and that the trial court failed to employ the balancing test to determine whether the probative value of the evidence was substantially outweighed by unfair prejudice. Although defendant correctly contends that the trial court failed to employ the balancing test, we conclude that reversal is not required because the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice.

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). The probative value of the other acts evidence involving defendant's uncharged conduct with both the complainant and her brother was relevant to the complainant's credibility and to rebut defendant's theory that the allegations were fabricated. *People v Sabin (After Remand)*, 463 Mich 43, 71; 614 NW2d 888 (2000); *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999). Thus, the evidence was not merely marginally probative, but was probative of the ultimate issue in this case, i.e., whether defendant committed the offenses alleged. See *Sabin, supra* at 71. The probative value of the evidence coupled with the trial court's limiting instruction ensured that the jury's considerations would be limited to defendant's guilt or innocence of the crimes alleged. *Starr, supra* at 503. Accordingly, defendant's argument that he is entitled to a new trial on this basis lacks merit.

Defendant next argues that he was denied his right to a fair and impartial trial and to present a defense when the trial court denied his requests to admit certain evidence. We disagree. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *Aldrich, supra* at 113.

Defendant initially contends that the trial court abused its discretion by denying his request to have the jury view a videotape of a portion of the complainant's brother's testimony from defendant's first trial. The trial court properly exercised its discretion under MRE 611 and MRE 403 and disallowed the evidence.

In denying defendant's request, the trial court expressed concern regarding the needless consumption of time, confusion of the issues, and waste of time. The court stated that the question presented was essentially whether to "allow another delving into the testimony after the witness has been here, up and gone." The trial court ruled that allowing the videotape evidence would "reopen the door," create confusion, and seemingly allow the presentation of other witnesses' testimony from the first trial. We agree with the trial court's concerns. Moreover, defense counsel had ample opportunity to cross-examine the complainant's brother and impeach him with prior inconsistent statements while he was testifying. Thus, the trial court's ruling did not deprive defendant of his right to present a defense as he contends. Further, although defendant argues that the trial court allowed the jury to view a videotape of Lisa Cowles's testimony from the first trial, he also concedes that Cowles could not be located to testify at defendant's second trial. Accordingly, the trial court did not abuse its discretion by disallowing the videotape evidence of the complainant's brother's testimony at the first trial.

Defendant also asserts that his right to a fair and impartial trial was compromised when the trial court denied his request to admit evidence that he was leaving to join the Navy. Defendant has arguably abandoned this issue by according it cursory treatment and citing no authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). In any event, although the basis for this claim is not entirely clear, it is apparently defendant's position that this evidence "could have created a bias toward defendant in the eyes of several witnesses and color[ed] their testimony . . . ." This argument is speculative and does not establish an abuse of discretion on behalf of the trial court. Moreover, defendant sought to admit this evidence through expert testimony that the complainant had a motive to lie because she did not want defendant, her uncle, leaving to join the Navy. Contrary to defendant's argument, the trial court did not exclude the proposed evidence, but ruled that it could be admitted if defendant established a foundation for the evidence, such as family jealousy that defendant was leaving to join the Navy, which may give rise to a motive to lie. Ultimately, defendant declined to present expert testimony at trial. Thus, defendant's argument is based on the erroneous premise that the trial court precluded him from presenting evidence of his intent to join the Navy.

Defendant further argues that the trial court abused its discretion by disallowing the admission of expert testimony challenging the prosecution's expert testimony regarding whether the complainant had a motive to lie. Defendant's theory was that because his father had previously been convicted of fourth-degree criminal sexual conduct, it was possible that defendant's father actually perpetrated the charged sexual assaults and that the complainant thus had a motive to lie regarding the identity of the perpetrator. We agree with the trial court's decision disallowing the evidence under MRE 404(b) as inadmissible propensity evidence on the

basis that defendant's position is essentially that because his father committed criminal sexual conduct previously, he likely perpetrated the assaults on the complainant.

MRE 404(b)(1) provides in relevant part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." This rule is not limited to evidence regarding a defendant, but applies with respect to any "person" because the rule "on its face applies to 'a person.'" *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). Thus, "a defendant remains bound by the requirement that the evidence is not offered to prove conformity with character." *Id.*

Here, the trial court properly excluded the evidence. Although defendant argued that the evidence was admissible to show a possible motive to lie on behalf of the complainant, he nevertheless attempted to admit evidence of his father's prior criminal sexual conduct conviction to draw the improper inference that because his father had committed such an offense previously, he likely did so again, and defendant is being blamed for his father's conduct. Because there was no evidence or allegation that it was defendant's father who committed the instant offenses, the most that this evidence could have shown was that defendant's father acted in conformity with his previous conduct on a different occasion. Such evidence constitutes improper propensity evidence contrary to MRE 404(b)(1). *Catanzarite*, *supra* at 580. Accordingly, the trial court did not abuse its discretion by excluding this evidence.

In addition to the above individual claims of evidentiary error, defendant argues that the cumulative effect of the trial court's rulings denying his requests to admit evidence denied him his right to a fair and impartial trial. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not" if the effect of the errors is seriously prejudicial such that the defendant was denied a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Because we conclude that no individual error occurred, there exists no cumulative effect of errors that denied defendant a fair trial. *Id.*

Defendant lastly contends that the trial court erred by failing to rule on or otherwise consider the affidavit of a juror which he alleges reflects the improper consideration of evidence. Defendant argues that he is entitled to a new trial or a hearing regarding the affidavit. This issue is unpreserved because, although defendant filed the juror affidavit in the trial court, he did not request a hearing or a ruling pertaining to the affidavit. In fact, defense counsel indicated at sentencing that he was not relying on the affidavit, but that he filed it merely to preserve the issue discussed in the affidavit for appellate review. Defendant fails to offer any support for the notion that the trial court was sua sponte obligated to hold a hearing or rule on the affidavit.

We review unpreserved issues only for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Id.*

Defendant has failed to establish plain error affecting his substantial rights. The juror affidavit on which he relies provides in relevant part:

7. We believed the victim's testimony when she indicated the Defendant sexually assaulted her many times.

8. While deliberating, the members of the jury did not examine any of the specific instances testified to by the victim in light of either specific charge, due to the Prosecutor's instructions.

Defendant argues that the affidavit confirms that the jurors failed to follow the trial court's instructions and instead followed the prosecutor's instructions.

Once a jury has been polled and discharged, its verdict cannot be impeached with a juror affidavit or testimony regarding mistakes or misconduct inherent in the verdict unless the affidavit or testimony relates to "extraneous or outside errors, such an undue influence by outside parties." *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). Thus, conduct inherent in the deliberative process, even if misguided, is not subject to challenge or review. *People v Fletcher*, 260 Mich App 531, 540; 679 NW2d 127 (2004). "A jury verdict may be challenged on the basis of juror misconduct only when the verdict is influenced by matters unrelated to the trial proceedings." *Id.* at 540-541.

Here, defendant alleges the jury followed the prosecutor's instructions in lieu of the trial court's. Accordingly, defendant's claim pertains to a matter intrinsic to the jury's deliberations, therefore; it is not subject to challenge or review. *Budzyn, supra* at 91; *Fletcher, supra* at 540-541. Consequently, defendant has failed to establish that the trial court's failure to hold a hearing or rule on the juror affidavit amounted to plain error affecting his substantial rights.

We affirm.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jane E. Markey